

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7466

Investigation into Petition filed by Vermont  
Department of Public Service re: Energy  
Efficiency Utility Structure

BRIEF OF THE  
VERMONT DEPARTMENT OF PUBLIC SERVICE

October 9, 2009

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## Introduction

On 9/30/99 the Vermont Public Service Board issued an Order in Docket 5980 that created Vermont's Energy Efficiency Utility (EEU). This Order established that the model pursuant to which the EEU would operate would be a three-year contract, with a three-year renewal option, between the Public Service Board and the entity serving as the EEU. The process by which the contractor would be selected was to be through competitive bid.<sup>1</sup>

The EEU began operation in March of 2000. On 7/13/07, the Board issued a memorandum<sup>2</sup> opening a workshop process to consider what if any changes should be made to the overall program structure given the lessons learned after more than seven years of EEU operations. That memorandum included a "Task Statement for Discussion of EEU Structure" that set out the reasons for considering a new structure, a charge for the working group, and a description of some other structural models for the working group to consider. On 8/15/07, following the initial meeting of the working group on 8/9/07, the Board issued a second memorandum<sup>3</sup>. This subsequent memorandum set forth the steps the parties would follow in exploring whether a change to the structure of the EEU was warranted, and if so, requested recommendations from workshop participants on what structure would best address the challenges identified by the Board in operation of the current structure.

Between August of 2007 and June of 2008, a series of 18 workshops was held by the Board and interested parties to consider the restructuring of Vermont's EEU. Among the possible structures examined by the working group was a long term order of appointment for a period of 12 years. Simultaneously, the Vermont legislature was considering making

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<sup>1</sup> Docket 5980 Order of 9/30/99.

<sup>2</sup> D 7466 Exhibit PSB-1 PSB Memorandum of 7/13/07 EEU Structure Task Statement

<sup>3</sup> D 7466 Exhibit PSB-2 PSB Memorandum of 8/15/07 EEU Structure Revised Task Statement

modifications to the electric energy efficiency structure. In 2008 the legislature amended 30 VSA § 209(d) to add subsection(d)(5)<sup>4</sup>, which authorized the Public Service Board to appoint an entity to serve as an EEU either through a contract or through an alternative structural mechanism termed an “order of appointment”. In June of 2008 the workshops concluded and resulted in a comprehensive document that set forth a proposal to change the EEU structure from a contract to a 12-year order of appointment. The *Draft Recommendation*<sup>5</sup>, while not representative of the positions of all workshop participants, captured the essence of the workshop effort.

#### Procedural History

On 8/29/08 the Department of Public Service filed a petition requesting the Public Service Board to open an investigation into changing the EEU structure and provided the *Draft Recommendation* as a starting place for that investigation. As a result the Public Service Board issued an Order on 9/11/08 opening Docket 7466.

#### Bifurcation

The Board, in its 9/11/08 Order sought input on whether the proceedings should be bifurcated to consider the threshold question of whether a change in structure was warranted before addressing what components would be included in a new structure. After some discussion and deferral of this issue, one party, International Business Machines Corporation (“IBM”) in a letter of 6/5/09, specifically requested that the Board bifurcate the proceedings. The Board ultimately denied the request to bifurcate the proceeding, ruling in its Order of

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<sup>4</sup> § 12 of Act 92 -2007 Adj. Session. Vermont Legislature

<sup>5</sup> D 7466 Exhibit VEIC-5 *Draft Recommendation For A New Energy Efficiency Utility Structure* June 16, 2008

6/19/09 that this was in part to avoid delay, and in part because “without the details of what a new structure might look like, we will not be able to effectively compare the alternatives.”

#### Intervention

Motions to Intervene were filed by Conservation Law Foundation (CLF) and International Business Machines Corporation (IBM) on 9/23/08 and 9/24/08 respectively. These motions were granted by the Board during the initial prehearing conference of 10/1/08.

Motions to Intervene were also filed by the following parties on the dates indicated and granted by the Board in an Order dated 10/29/09:

- Green Mountain Power Corporation (GMP) - 10/8/08
- The Group of Municipal Electrical Utilities (GMEU) - 10/8/08
- Associated Industries of Vermont (AIV) - 10/9/08
- City of Burlington Electric Department (BED) - 10/9/09
- Central Vermont Public Service (CVPS) - 10/9/08
- Vermont Electric Power Company Inc. (VELCO) - 10/9/08
- Washington Electric Cooperative, Inc. (WEC) - 10/10/09

Vermont Marble Power Division of OMYA sought intervention on 10/15/09 and was granted intervention on 11/26/09.

Vermont Energy Investment Corporation (VEIC) sought intervention on 10/8/09 and, following briefing on the subject of whether its participation could raise a conflict of interest given their status as the current contractor, was granted permissive intervention by the Board in its Order of 1/22/09 on condition that VEIC, and not Vermont ratepayers, bear the cost of VEIC's participation in the proceedings.

### Expert Consultation on EEU Structure

On 12/1/08 the Department, in its status report to the Board, requested additional time, and the Board's permission, to employ an expert consultant with experience in energy efficiency matters to evaluate the proposed 12-year Order of Appointment structure. Following a 12/31/09 status conference at which the request was discussed, parties were given an opportunity by the Board to comment on the request and the related RFP, the possible funding sources, and a proposed schedule for the remainder of the docket. On 1/29/09 the Board issued an Order approving the request and setting a schedule for the next 90 days. Subsequently, on 2/26/09 the Board approved funding in an amount not to exceed \$25,000 from the unallocated interest on the EEU Fund to pay for the consultant.

The Department retained the services of GDS Associates, Inc. in February of 2009 and following meetings with the Department and the parties to this docket, GDS prepared and presented a *Draft Report*<sup>6</sup>, which notably supported a change in EEU structure to a long term Order of Appointment.

### Submission of Testimony and Technical Hearings

Following a 4/29/09 status conference, the Board issued a scheduling Order on 5/8/09 granting the parties until 5/29/09 to report to the Board whether settlement had been reached, and if not, to identify the significant outstanding issues. The Order also set a schedule for the filing of testimony and technical hearings in June and August of 2009.

As no settlement was reached the matter proceeded toward technical hearings. Based on requests from various parties, the Board revised the scheduled dates for the hearings and the

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<sup>6</sup> D 7466 Exhibit VEIC-9 GDS Associates Draft Report - Review of EEU Structure Compensation & Length of Appointment

deadlines for submission of direct, rebuttal and sur rebuttal testimony in Orders dated 6/19/09, 7/2/09, 8/20/09 and 9/11/09. As a consequence: Direct Testimony was filed on 6/26/09; Rebuttal Testimony was filed on 7/31/09; and Sur Rebuttal Testimony was filed on 8/28/09 and on 9/9/09. CLF's Motions to Strike the Direct Testimony of AIV and IBM and the rebuttal testimony of IBM were denied by the Board in Orders dated 8/19/09 and 9/3/09. Technical Hearings took place on 9/15/09 and 9/16/09.

### Summary of Brief

In this brief, the Department of Public Service addresses the major substantive issues that remained in dispute at the commencement of the technical hearings in this docket. In chronological order, though not necessarily in order of importance these issues are:

- Whether a change from the current Contract structure to an Order of Appointment is in the best interests of Vermont ratepayers and will promote the public good?
- What is the appropriate term for an Order of Appointment?
- Should there be an Initial Overall Performance Assessment prior to an order of appointment where the decision to grant that appointment to a given entity has not been the result of a competitive bid process?
- Should there be a Preliminary Performance Review at three year intervals to benchmark the programs and past performance of Vermont EEUs and compare them to the programs and performance of other entities providing energy efficiency services in other jurisdictions throughout the country and the world? And if so, what Board process should be associated with this review and should the review be accompanied by a presumption that a negative result triggers an Overall Performance Assessment?

- Should there be an EEU Facilitator in the new structure to perform the functions currently performed by the Contract Administrator?
- If funding sources in addition to the EEC (Energy Efficiency Charge) become available to an EEU for the provision of energy efficiency services, how should those alternative funding sources be considered in setting or adjusting budgets, goals or future EEC amounts?
- Should the Order of Appointment structure retain the EEU Advisory Committee that is part of the current contract structure?

**I. Would a change from the current contract structure to an Order of Appointment structure improve the efficient and cost effective delivery of energy efficiency services in Vermont and promote the public good?**

Findings

1) The Department of Public Service, all gas and electric utility companies as well as the Public Service Board have been encouraged by the Vermont legislature to propose, develop, solicit and monitor programs that result in the conservation and efficient use of energy. 30

V.S.A. § 209(d).

2) The Public Service Board has ongoing obligations to require that: “continued or improved efficiencies be made in the production, delivery and use of energy efficiency services”; to “consider innovative approaches to delivery energy efficiency”; and to “approve programs, measures, and delivery mechanisms that reasonably reflect current and projected market conditions, technological options and environmental benefits.” 30 V.S.A. § 209(e).



3) The initial structural mechanism utilized for delivery of energy efficiency services was a three-year contract, with a three-year renewal option, between the Board and the EEU. Docket 5980 – Public Service Board Order of 9/30/99.

4) Since the inception of operations in 2000, the Vermont EEU has, relative to their current performance metrics, performed well under the current contract structure. “The EEU’s performance has exceeded expectations, and it has been recognized nationally as an innovative government program.” Exh. PSB-1 Task Statement for Discussion of EEU Structure at 1. “In fact, Efficiency Vermont has been widely recognized as a leader in provision of efficiency service, and has been largely successful in meeting aggressive savings goals.” DPS Petition 8/29/08 at 2. “In fact, the current structure has provided numerous benefits to Vermont’s ratepayers.<sup>7</sup> Vermont has consistently been rated as having one of the best energy efficiency programs in the nation.” Poor pf. at 5.

5) The three-year contract cycle has, operationally, posed problems and challenges during the past nine years. These include:

- Reduction in number of entities participating in competitive bid process to serve as EEU.
- Barriers to engaging fully in effective long term-planning.
- Potential conflict between the Board’s judicial role with the Board’s administrative role as EEU contract manager.
- Problems associated with the restrictions on EEU participation in Board proceedings.
- Risk that statements of policy or opinion by the EEU will be attributed to the Board, based on the EEU’s status as Board contractor.

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<sup>7</sup> This quotation corrects a typographical error in the original testimony.

- Uncertainty associated with participation in the regional forward capacity market which requires bidding three years prior to the time of delivery.

Exh. PSB-1 Task Statement for Discussion of EEU Structure at 1.

6) The objective of the EEU structure workshops and the ensuing Board investigation initiated by the Department's petition was to determine whether a change in structure could ameliorate the problems identified in the contract structure "while preserving the strengths of the current EEU program". Exh. PSB-1 Task Statement for Discussion of EEU Structure at 2. "The structural changes being proposed are intended to improve the structure based on almost a decade of experience in evaluating and overseeing EEU performance, as well as to address challenges created by the ever increasing scope and complexity of energy efficiency service delivery. The goal is to enhance the ability of an EEU to meet the many public purpose objectives assigned to that entity while at the same time minimizing the level of bureaucratic administrative burden necessary to ensure effective services." Poor pf. at 5.

7) The Board has been given authority by the Vermont Legislature to utilize either a contract or an Order of Appointment structure to implement energy efficiency and conservation programs. 30 V.S.A. § 209(d)(5).

8) The Order of Appointment model has thus been recognized as an appropriate structure to be used in meeting the goals and objectives identified by the Vermont Legislature in 30 V.S.A. § 209(d) and (e) for energy efficiency and conservation programs.

9) The Order of Appointment structure was the basis for the proposal contained in the *Draft Recommendation*, which was supported by some, but not all of the workshop participants. Exh. VEIC-5.

10) An Order of Appointment structure would provide the following benefits:

- “enhance the oversight and accountability of an EEU by blending the existing successful performance driven competitive model with more traditional regulated utility cost of service type regulation.” Poor pf. at 8.
- “create regular predictable opportunities for the review of programs and EEU spending by the Department, the Board and other stakeholders, allowing for additional review at any other time for cause.” Poor pf. at 8.
- “enable the Department and the Board to encourage better performance through the use of the same regulatory mechanisms that are used to improve service quality from traditional utilities.” Poor pf. at 9.
- Increase stability in situations where an EEU demonstrates exemplary performance by “avoiding unnecessary re-bid processes that have little prospect of soliciting competitive bids, but can nonetheless be highly disruptive to efficiency delivery efforts.” Poor pf. at 10.
- Eliminate potential conflicts inherent in the Board’s role as Contractor by enabling the Board to “operate solely as the administrative tribunal whose charge it is to ultimately decide the various energy efficiency regulatory matters before it with the EEU, DPS and other parties presenting issues and providing testimony and comments in support of a particular result.” Poor pf. at 11.
- Increase transparency by eliminating closed session contract negotiations while also enabling “greater participation from stakeholders in the process of setting quantifiable performance indicators” and providing “a greater opportunity for input” through “an open Board process in which stakeholders may propose new ideas from different perspectives.” Poor pf. at 11.

11) A change to an Order of Appointment structure is supported by the following parties to this docket:

- Department of Public Service - Poor pf. at 3; Fratto pf at 5.
- Vermont Energy Investment Corporation - Hamilton pf. at 12; Plunkett reb. at 12.
- Conservation Law Foundation - Steinhurst pf. at 8.
- Burlington Electric Department - Buckley pf. at 4.
- Central Vermont Public Service Corporation - Bentley pf. at 3.
- Green Mountain Power Corporation - Martin pf. at 4.
- Vermont Electric Power Company, Inc. - Frankel pf. at 2.

#### Discussion

The Board recognized some very specific shortcomings of the current contract model in the two memoranda that commenced the workshop process that led to this docket. The Board and the participants of the workshop series developed the Order of Appointment model to address those shortcomings. The model, as described in detail in the *Draft Recommendation* of 6/16/08, addresses these shortcomings and has not been changed in subsequent revisions to that document. Significantly the vast majority of the parties to the docket support a change to the Order of Appointment structure.

While both IBM and AIV oppose the Order of Appointment structure, only IBM has articulated specific objections to the Order of Appointment model. IBM prefers the current contract model and opposes the Order of Appointment because it “does not assure the least cost solution has been selected” and because the model “ignores the possibility of new innovative ideas from other potential suppliers.” Aldrich pf at 10-11.

While this first reason could be true in a theoretical sense, it will not necessarily be true in practice. First, it grossly oversimplifies the complex undertaking of estimating the total cost of providing energy efficiency services to nearly the entire State of Vermont. In addition, while the Order of Appointment model itself may not assure the 'least cost solution', this result can be achieved through the processes of setting and adjusting budgets, setting quantifiable performance indicators, verifying savings, and through the many other review components built into the Order of Appointment structure.

Furthermore, as the Board and all parties to the docket are aware, the lack of competitive bidders to provide these services is one of the reasons why an alternative to the contract structure is being sought. In the absence of competition if one is required to procure services by contract, there is absolutely no way to assure that the least cost solution has been obtained. Indeed, conducting costly bid solicitation processes in the absence of competition adds significant costs that provide no benefit.

IBM's second objection is simply not correct. In every iteration of the Order of Appointment model as proposed by the parties to this docket, the importance of ensuring that new and innovative ideas from any source, including other suppliers, is highlighted. Simply put, the model contemplates multiple suppliers. This is most apparent in the language used at the very beginning of the *Draft Recommendation*: "The Parties agree that the *Board* should, at this time, establish a single mechanism, one or more EEU's, for the acquisition of cost-effective demand-side resources". Exh. VEIC-5.

Finally neither IBM nor AIV squarely addresses the conflicts, potential conflicts and difficulties to the Board and to the current EEU that have arisen from the contract structure. These issues are real and need to be resolved. The Order of Appointment model restores the

Board to its traditional judicial role and eliminates the conflict and potential conflicts inherent in its role as contractor.

A change in EEU structure from the contract model to an Order of Appointment will promote the public good.

**II. What length of term for an Order of Appointment will deliver the maximum benefit of this structure while minimizing potential risks to ratepayers that arise in the face of lack of competition for energy efficiency services?**

Findings

12) The legislature has authorized a term for an Order of Appointment “not to exceed 12 years”. 30 V.S.A. § 209(d)(5).

13) The Board identified certain problems with the three-year term that is associated with the current contract structure. A limited duration contract poses challenges to long term planning as well as difficulties in bidding resources into the forward capacity market. Additional problems associated with a limited duration term have been described as ‘end of cycle’ concerns and pertain to the disruption and expense associated with the competitive bid process that occurs at the end of a contract period, which must be borne by the Board and the EEU, as well as the Vermont ratepayers.

The effort and expense of conducting a bid solicitation process must also be considered in light of Vermont’s experience that the number of entities interested in bidding to provide such services has diminished over time. Exh. PSB-1 Task Statement for Discussion of EEU Structure at 1. Petition of the Department of Public Service for an Investigation into modification of the structure of Vermont’s Energy Efficiency Utility 8/29/08 at 1. Poor pf. at 8.

14) The Department proposed that the Board adopt a “Rolling Appointment” to address the problems and challenges associated with a limited duration contract, some of which will recur, albeit at a later point in time, with a limited duration order of appointment. Poor pf. at 13. Exh. DPS-WP-1-Revised.

15) The key features of the Rolling Appointment are as follows:

- The Board conducts an initial Overall Performance Assessment of incumbents. Poor pf. at 14 and 18. DPS-WP-1 Revised - Line 2.
- The Board appoints an entity to serve as an EEU for a term of no less than six years<sup>8</sup>. Poor pf. at 14. Exh. DPS-WP-1 Revised - Line 8.
- 18-24 months prior to the end of that first term a mandatory Overall Performance Assessment (OPA) is conducted. Poor pf. at 14. Exh. DPS-WP-1 Revised - Line 14.
- A positive result from the OPA will result in the Board granting a three year extension of the appointment term. Poor pf. at 14. Exh. DPS-WP-1 Revised - Lines 15-16.
- In the year following the end of the original term, which will be three years after the mandatory OPA, the Department conducts a Preliminary Performance Review (PPR). Poor pf. at 14. Exh. DPS-WP-1 Revised - Line 21.
- A positive outcome from the PPR will result in the Board granting a three year extension on the appointment term. Poor pf. at 14. Exh. DPS-WP-1 Revised - Lines 23-24.
- Three years later, the next mandatory OPA is conducted. Poor pf. at 14. Exh. DPS-WP-1 Revised - Line 30.

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<sup>8</sup> This description of the Department’s Rolling Appointment is based on the following: 1) that there is a presumption that the current contractors VEIC and BED will be the initial appointees; 2) that there will be an initial Overall Performance Assessment (OPA) conducted prior to the appointment; 3) that there will be a three year interim Preliminary Performance Review (PPR); and 4) that there will be a mandatory OPA at six year intervals. Detailed Findings and a discussion about the appropriate intervals for and types of EEU review (OPA and PPR) are addressed later in Section III of this brief

- A positive outcome from the OPA will result in the Board granting a three year extension on the appointment term. Poor pf. at 14. Exh. DPS-WP-1 Revised – Lines 31-32.
- “This process would repeat itself every three years. An OPA would be mandatory at least every six years. In the years that an OPA is mandatory, the Department would not conduct a PPR. The rolling appointments will continue as long as the well performing incumbent appointee remains in place.” Poor pf. at 14. Exh. DPS-WP-1 Revised.

16) The rolling appointment model provides greater stability to an appointee with positive performance, eliminates a presumption that there will be an end of cycle bid process, and avoids costs associated with unnecessary competitive bid solicitations. Poor pf. at 16.

17) The Department’s rolling appointment proposal “should deliver all of the benefits of a longer fixed term contract while also resolving end of cycle problems and helping to mitigate some of the risks associated with a longer fixed term appointment.” Fratto pf. at 10.

### Discussion

The Department’s rolling appointment term for the Order of Appointment model maximizes stability and flexibility; benefiting the EEU, the Board, and Vermont ratepayers, while virtually eliminating all of the ‘end of cycle’ problems associated with either a short or long duration fixed term contract or appointment. The rolling appointment term is affirmatively supported by GMP. Martin pf. at 4.

No party to the docket who supported a change to the Order of Appointment model objected to the *concept* of a rolling appointment. AIV, who does not support the Order of Appointment model because it does not mandate a competitive bid process on a three-year cycle, also expressed opposition to the rolling term of appointment on the same basis. Driscoll 9/16/09 tr. at 191-193. However, the obligation to conduct frequent expensive competitive bid



processes, particularly in the face of dwindling bidder interest is precisely the problem that the rolling appointment is designed to avoid. The rolling nature of the appointment intentionally avoids the cost and disruption associated with mandatory bidding processes where there is an entity in place delivering exemplary performance. However, the model also retains the possibility of a competitive bid process, and the various performance reviews are intended to trigger a regular inquiry into whether such a process is necessary and likely to be useful.

Several parties to the docket, notably VEIC and CLF take issue with the rolling term that is a central feature of the Department's proposal, but do so mostly on the basis of the type and frequency and Board process associated with the various performance reviews suggested by the Department<sup>9</sup>, rather than because they object to the rolling term itself. While VEIC also opposes the Department's rolling appointment based on the specific term lengths proposed (initial 6 year term<sup>10</sup> with 3 year extensions), at hearing VEIC indicated this objection was to not to the rolling aspect of the term, but only to the proposed length and acknowledged that a rolling appointment could indeed eliminate end of cycle problems. Hamilton 12/15/09 tr. at 236.

The proposal that is most similar to that of the Department with respect to the term was made by CLF, whose expert proposed an "indefinite term". Steinhurst pf. at 9. The indefinite term does not comply with the legislative limit placed on the term for an EEU appointment, which specifies a term not to exceed 12 years. Thus CLF's proposal is unhelpful under current law. However, in proposing the indefinite term, CLF supports the Department's conclusion that the ideal term for the Order of Appointment is one that does not include a fixed end point and

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<sup>9</sup> Findings and discussion relating to the nature and interval of EEU performance reviews proposed by the Department are contained in Section III of this brief.

<sup>10</sup> The initial term of the appointment is anticipated to be longer than six years to coordinate with current planning and budget cycles.

this is because this eliminates disruptive, costly and unproductive end of cycle impacts. The rolling appointment accomplishes this.

The essential premise of the rolling appointment is that based on positive performance, the term is extended midway through the first appointment period for half as long as the initial term, and that this process continues uninterrupted so long as an entity continues to receive positive performance reviews. The rolling term of a six year appointment with a three year extension<sup>11</sup> for the Order of Appointment for Vermont's EEU promotes the public good and should be adopted by the Board.

**III. What are the appropriate types and intervals of performance review necessary to ensure the continued delivery of efficient, high quality, cost effective, and innovative energy efficiency services by a Vermont EEU under an Order of Appointment structure?**

**A. Mandatory Overall Performance Assessment at Six Year Intervals**

Findings

18) The *Draft Recommendation* included a proposal that there be an Overall Performance Assessment (OPA) conducted by the Board no less frequently than every six years to determine "if there are probable net benefits from going to the market to consider offers from alternative implementation entities." Exh. VEIC-5 at 18.

19) The Department and VEIC affirmatively support the mandatory OPA every 6 years as proposed in the *Draft Recommendation*. Poor pf. at 15. Fratto pf. at 11. Hamilton pf. at 14. Plunkett reb. at 22.

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<sup>11</sup> The Department's recommended term lengths correlate to the performance review cycles and are explained in greater detail in Section III of this brief.

- 20) All other parties to the docket that commented on performance review issues supported review at regular intervals. CLF supports “timely and effective evaluation of EEU performance. Steinhurst pf. at 7. IBM supports a public performance assessment every three years. Aldrich pf. at 14.
- 21) No party to the docket either in prefiled testimony or at the technical hearings expressed opposition to a mandatory OPA every 6 years.

### Discussion

Performance assessments at regular intervals have been part of the Vermont EEU structure since its inception in 1999. All parties to these proceedings support a requirement that an EEU undergo a Board supervised Overall Performance Assessment process at a minimum interval of every six years. A mandatory Overall Performance Assessment at least every six years conducted by the Board as part of an Order of Appointment structure promotes the public good and should be included in any new EEU structure.

#### B. Overall Performance Assessment prior to Initial Appointment for Incumbent

### Findings

- 22) The Department has recommended that incumbent EEUs be afforded a presumption that they will be selected as the initial appointees following a Board decision to implement an Order of Appointment model. Poor pf. at 18.
- 23) Though the language is somewhat ambiguous, the *Draft Recommendation* could fairly be read to contain a presumption that BED and VEIC will be appointed to continue to serve as Vermont’s EEUs. “The Parties agree that the *Board* should issue an order under 30 V.S.A. § 209(d)(2) appointing *VEIC* and *BED* to serve as *EEUs* until such time as the *Board* selects any

other entities through the review and reconsideration of *Appointment* processes described in this document.” Exh. VEIC-5 at 24.

24) The *Draft Recommendation* further suggests that “The Board may, or may not, choose to conduct a review similar to the Overall Performance Assessment as described above...prior to the initial appointment.” Exh. VEIC-5 at 24.

25) The Department has recommended that the Board conduct an initial OPA of incumbent EEUs prior to awarding them an Order of Appointment. Poor pf. at 18. Fratto pf. at 11.

26) As reasons for this recommendation the Department has testified: “The initial OPA would serve two purposes: 1) to ensure that the performance of the incumbent is excellent in relation to its peers, and 2) to provide a benchmark for future reviews of the appointee.” Poor sur reb. at 5.

27) The Department noted: “As of August 2009 it has been nearly five years since the last competitive bid process to determine what entity would provide efficiency resources in Vermont. When this Board authorized the beginning of Efficiency Vermont in Docket 5980, the prevailing belief was that competition was sufficiently robust to ensure high quality efficiency services would be delivered at the lowest possible cost. This is no longer true. An initial OPA will provide a meaningful alternative where competition to deliver efficiency services is not present. Further, although EEU savings claims have been rigorously verified, no independent benchmarking of the EEU’s portfolio of programs has been recently undertaken.” Poor surreb. at 6. An initial OPA could also be used to address concerns by some parties about whether the proportion of EEU expenditures on overhead is appropriate. IBM pf. at 10.

### Discussion

VEIC, CLF, CVPS, and BED do not support an initial OPA, mainly on the grounds that a history of positive performance of the current EEUs obviates the need for any pre-appointment evaluation. However, the type of evaluation contemplated by either the OPA process or the competitive bid process has not occurred for almost five years. Underlying the Department's request for an initial OPA is a recognition that in the absence of a competitive bid process, and in the face of diminishing competition to provide efficiency services, that some evaluative effort should be undertaken by the Board on behalf of Vermont ratepayers to ensure that the multi-year multi-million dollar investment in the delivery of energy efficiency services is being providently made. Stringent regulatory oversight has long been the proxy for competition in largely monopolistic markets. The initial OPA serves the same purpose as the mandatory six year OPA, which all parties agree is a good idea. The Board should conduct an Overall Performance Assessment of current EEU contractors prior to issuing an initial Order of Appointment.

#### C. Preliminary Performance Reviews at Three Year Intervals

##### Findings

28) The Department has proposed that it be required to conduct a Preliminary Performance Review of an EEU on a three year basis.<sup>12</sup> The PPR is "a layer of review not undertaken now or contemplated during the workshop process. It is essentially an exercise to benchmark Vermont's EEUs versus those in other jurisdictions, normalizing for program maturity, funding, demographics, and other important variables." Poor pf. at 15.

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<sup>12</sup> As noted on Exh. DPS- WP-1-Revised, Line 21, this three year cycle does not begin at year three of an initial appointment cycle due to the need for the entity to establish a record of performance on which to conduct the review.

- 29) The DPS proposal contemplates that “after conducting a mid cycle Preliminary Performance Review, the Department is obliged to make a supported recommendation to the Board if they conclude that an OPA is unnecessary<sup>13</sup>.” Thus if the review demonstrates inadequate performance, the Department would recommend that the Board conduct an OPA, while if the review demonstrates exemplary performance, the Department would recommend that there is no need for the Board to conduct an OPA. Poor pf. at 17.
- 30) The Department’s PPR proposal affords the Board the ultimate authority to decide whether there was cause to conduct an OPA at that juncture.<sup>14</sup> Poor pf. at 17.
- 31) VEIC is very supportive of the concept of a PPR as is CLF, though both parties object to a PPR being linked to a presumption that if performance is sub par an OPA will occur. Hamilton 9/15/09 tr. 219. Steinhurst 9/15/09 tr. at 125-130.

#### Discussion

No party objects to the value of benchmarking an EEU’s performance and comparing it on a regular basis to the marketplace, as well as to the programs and performance of entities in other jurisdictions. The PPR will benefit EEUs, the Board and Vermont ratepayers by regularly and routinely providing important information that will ensure that Vermont’s EEUs are performing well and are being as innovative as possible. The practice of benchmarking should be viewed as no different than developing an allowed rate of return for an electric utility based in part on a representative sampling of similar utilities.

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<sup>13</sup> This quotation corrects a typographical error in the original testimony.

<sup>14</sup> Though perhaps unclear as initially proposed, upon cross examination the Department’s witness clarified that the Board and not the Department would make the ultimate decision about whether an ‘interim’ OPA was required and that the Board, not the Department had the authority to design an appropriate process to review the recommendation. Poor 9/15/09 tr. at 59.

The objection to the PPR, which came primarily from VEIC and CLF, appears to be not so strongly linked to the periodic nature of the review (every 3 years) but rather to the Department's proposal that a negative PPR would presumptively result in an OPA which could lead to a competitive process. VEIC witnesses testified that their concern was that this could possibly translate to a perception of uncertainty in the marketplace and on behalf of VEIC subcontractors. Such an analysis is extremely speculative and is based on the questionable notion that there will be detailed public knowledge about the intricacies of the EEU review process. There is no evidence that this scenario is accurate.

Moreover, even if there is widespread awareness as to the existence of regular and routine reviews, this is likely to increase confidence and contribute to a public perception that an incumbent EEU is performing well. Indeed, a well performing entity should not have reason for concern because their certainty that they are exhibiting exemplary performance will provide all the confidence they need to be assured that their appointment will continue. A poorly performing entity, on the other hand, should be concerned about a periodic review that may uncover shortcomings and potentially lead to a loss of appointment. This is precisely why institutionalizing the PPR is useful, and why linking negative results on a PPR to a presumption that an OPA will be conducted under those circumstances is necessary and in the best interests of Vermont ratepayers.

**IV. Should the functions currently performed by the EEU Contract Administrator be included in an Order of Appointment?**

Findings

32) The current Contract Administrator is responsible for providing a monthly review of all EEU invoices, authorizing payment to an EEU by the Fiscal Agent responsible for the EEU Fund, issuing a bi-monthly report regarding EEU achievement to interested parties, and mediation of disputes particularly between the EEU and the DPS.<sup>15</sup>

33) The role of the Contract Administrator has been a necessary part of the contract structure. Poor pf. at 21. While there are some functions of the current Contract Administrator position that are critical to administrative efficiency, the EEU Facilitator role is not essential in an Order of Appointment structure. Plunkett 9/16/09 tr. at 77 and 74.

34) Under an Order of Appointment structure, the mediation role assigned to the current Contract Administrator is unnecessary because any irresolvable disputes should come before the Board. Poor pf. at 21.

35) It would be possible to divide the duties currently performed by Contract Administrator, between the EEU and the Department of Public Service as appropriate. Poor 9/15/09 tr. at 81.

Discussion

While the duties performed by the Contract Administrator under the current contract structure are necessary and important to the proper functioning of an EEU, in the structure of a regulated utility these duties are divided between the entity itself and the regulatory authorities.

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<sup>15</sup> Though not part of the record in this docket, the duties of the contract administrator are set forth in the Board's most recent RFP for the EEU contract, which is available on the Board's website at:  
<http://psb.vermont.gov/sites/psb/files/projects/EEU/2008carfp/2008CARFPFinal.pdf>



To the extent that the Board finds that there are unique aspects of EEU operations that would require administrative services by a third party, the Board can determine an appropriate mechanism for assuring that this occurs. In an Order of Appointment structure the Board should ensure that responsibility for these duties is clearly assigned to the appropriate parties and should include the amount of oversight authority necessary to make certain that those duties are properly performed in a timely manner.

**V. What process should be employed to determine whether alternative funding that may become available to an EEU should offset collections through the energy efficiency charge (EEC)?**

Findings

36) Seeking funds from third-party sources has been required by the contract between the Board and VEIC. Hamilton pf. at 39.

37) Since 2000 VEIC has pursued third-party funding to increase the amount of efficiency investment it can stimulate. Plunkett reb. at 38.

38) The Public Service Board should encourage an EEU to seek alternative funding mechanisms. Poor pf. at 22.

39) Under an Order of Appointment structure, expenses incurred by an EEU for efforts to seek alternative funding should be funded through non-resource acquisition compensation methodology. Poor pf. at 22.

40) Any Board process to determine the appropriate disposition of alternative funds should be commensurate with the amount of funds at issue, and should take into account the administrative burden of conducting such a process. Poor pf. at 22.

### Discussion

Since its inception, the EEU has been encouraged to seek alternative funding sources to increase the amount of efficiency investment it can stimulate. No parties have objected to the concept that the EEU should continue to seek funds in addition to the Board authorized budgets. Indeed, the Department has recommended that the EEU continue to be encouraged in such efforts, and be compensated for them through non-resource acquisition compensation methodology to ensure such efforts take place. In the case where the amount of additional funding is *de minimus*, it is not in anyone's interests to have an expensive protracted process for deciding whether an offset is appropriate. However, if an EEU were to acquire a significant amount of funding in addition to its current budget, it is in the State's best interest to have a proceeding to determine the best use of those funds. The Board should decide on a case-by-case basis, in a process that is proportional to the amount of funds at issue, whether an offset is appropriate

#### **VI. Would the EEU Advisory Committee serve a useful and valuable function under an Order of Appointment structure?**

### Findings

41) Under the current contract structure, the EEU Advisory Committee has certain roles and obligations with respect to the Board, and it has been appropriate for the Board to establish and appoint members of the committee. Hamilton pf. at 38.

42) The transparency and public input functions that the EEU Advisory Committee has been designed to provide will be supplanted in an Order of Appointment structure with the public process to set the budget and the performance indicators for an EEU. Poor pf. at 21.

- 43) In the Order of Appointment model an EEU would have the flexibility to create and to determine the role and composition of an advisory committee if it chose to do so, but that committee would have responsibilities only to the EEU. Hamilton pf. at 38. Poor pf. at 21.
- 44) There is no need to specify an EEU Advisory Committee in an Order of Appointment. Hamilton pf. at 38.

### Discussion

In an Order of Appointment structure an EEU would have the authority to create an Advisory Committee if it determined that it would be beneficial to EEU operations. Thus there is no need to specify that this function should occur under an Order of Appointment. AIV argues that an Advisory Committee could provide independent assessments of and advice on EEU programs and services. GMP assumes a need for the Advisory Committee, and similarly argues that “independent and informed support and criticism” cannot be attained if the Committee is appointed by an EEU. However, where the public processes of budget setting, goal setting, and review in an Order of Appointment are an adequate substitute for the independent review and public input functions of the current Advisory Committee, such a committee is not necessary in an Order of Appointment structure.

Conclusion

The Board should find that changing Vermont's EEU structure to an Order of Appointment with a rolling term of six years with three year extensions is in the best interests of Vermont ratepayers. The Board should further find that an initial Overall Performance Assessment is appropriate for the first appointees and that, as recommended by the Department, a regular cycle of Preliminary Performance Reviews every three years and Overall Performance Assessments every six years for Vermont's EEUs promotes the public good.

Dated at Montpelier, Vermont this 9<sup>th</sup> day of October, 2009.

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: \_\_\_\_\_

  
Jeanne Elias  
Special Counsel

cc: Service list